# Muhamad Jafri bin Jantan & Ors v Zainal bin Md Rais

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C–04–44 OF 2004
ABDUL MALEK PCA, ARIFIN ZAKARIA AND TENGKU BAHARUDIN SHAH JJCA
20 JANUARY 2005

*Civil Procedure — Appeal — Cross appeal — Absence of cross appeal to counterclaim — Whether trial judge correct in omitting to consider counterclaim*

*Tort — Negligence — Road accident — Apportionment of liability — Collision between motorcycle and motorcar involving pillion rider — Pillion rider — Entitlement to damages — Whether entitled to recover total amount of damages*

The appellant ('the second plaintiff') was involved in a road traffic accident involving a motorcycle ridden by the first plaintiff and a motorcar driven by the respondent ('defendant'). The second plaintiff was the pillion rider on the said motorcycle. The sessions judge dismissed both claims by the plaintiffs and the counter claim by the defendant. The plaintiffs appealed to the High Court against the said decision. The trial judge allowed the appeal and apportioned liability on a 50:50 basis between the parties. The second plaintiff appealed to the Court of Appeal against the decision of the High Court on the issue of the apportionment of liability. The primary issue before the court was whether the second plaintiff as the pillion rider was entitled to damages on 100% basis despite the fact that the court had found the rider of the motorcycle 50% liable for the accident. The defendant submitted that the trial judge failed to address the issue of his counter claim and it was further submitted that the trial judge ought to have allowed the counter claim against the first plaintiff which would have resulted in the reduction of amount awarded to the second plaintiff.

**Held**, allowing the appeal with costs:

(1) The counter claim was a non-issue as there was no cross appeal by the defendant and therefore, the trial judge was correct in not considering the counter claim of the defendant (see para 8).

(2) The trial judge erred in law in holding that the second plaintiff was 50% liable for the accident. Following the authorities cited, the second plaintiff as an innocent passenger in a motor vehicle or a pillion rider was entitled to recover the total amount of damages against the defendant (see paras 10 and 11).

## [Bahasa Malaysia summary

Perayu ('plaintif kedua') terlibat dengan satu kemalangan jalan raya yang melibatkan sebuah motosikal yang dibawa oleh plaintif pertama dengan

sebuah kereta yang dipandu oleh responden ('defendan'). Plaintif kedua adalah seorang pembonceng motosikal tersebut. Hakim sesyen telah menolak kedua-dua tuntutan pihak plaintif dan tuntutan balas defendan. Plaintif-plaintif membuat rayuan ke Mahkamah Tinggi terhadap keputusan tersebut. Hakim bicara telah membenarkan rayuan plaintif-plaintif dan membahagikan liabiliti di antara pihak-pihak pada kadar 50:50. Plaintif kedua telah merayu ke Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi atas isu pembahagian liabiliti. Isu utama di hadapan mahkamah adalah sama ada plaintif kedua sebagai pembonceng berhak mendapatkan ganti rugi 100% walaupun mahkamah mendapati pemandu motosikal bertanggungjawab 50% terhadap kemalangan tersebut. Defendan mengadu bahawa hakim bicara gagal untuk memutuskan isu tuntutan balas defendan dan beliau selanjutnya menghujahkan bahawa hakim bicara sepatutnya membenarkan tuntutan balas tersebut terhadap plaintif pertama yang akan membawa kepada pengurangan jumlah award yang diberikan kepada plaintif kedua.

**Diputuskan,** membenarkan rayuan dengan kos:

(1) Tuntutan balas tersebut tidak wujud sebagai satu isu oleh kerana tidak terdapat sebarang rayuan silang dari responden mengenainya dan dengan itu, hakim bicara bertindak wajar dalam tidak mempertimbangkan tuntutan balas defendan (lihat perenggan 8).

(2) Hakim bicara telah tersilap pada undang-undang kerana memutuskan yang perayu sebagai seorang pembonceng motosikal bertanggungjawab 50% terhadap kemalangan tersebut. Menurut autoriti-autoriti yang dikemukakan, perayu sebagai seorang penumpang yang tidak bersalah sebuah kenderaan bermotor atau seorang pembonceng berhak untuk mendapat jumlah penuh ganti rugi daripada defendan (lihat perenggan 10 dan 11).]

## Notes

For cases on road accidents, see 12 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1056–1288.

For cases on collisions between vehicles, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 281–355.

## Cases referred to

*Damai Cheras Sdn Bhd & Anor v Poothapillai Krishnamoorthy* [1998] 1 MLJ 639 (refd)

*Jayakumar s/o Kuppusamy & Anor v Chen Kit Hong & Anor* [1984] 1 MLJ 376 (folld)

*Murugasan a/l Kuppusamy & Anor v Chiew Eng Chai* [1999]4 MLJ 516 (refd)

*Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244 (folld)

*Reliance Omnibus Co Sdn Bhd & Anor v Ishak bin Mohd Jaafar & Anor* [1993] 4 CLJ 291; [1993] MLJU 10 (folld)
*Samsuri bin Saad & Anor v Chew Kit Toh (t/a Kit Thong Woh Hup) and Another Appeal* [1996] 1 MLJ 576 (folld)
*Wong Fook & Anor v Abdul Shukur bin Abdul Hakim (Wong Piang Loy, Third Party)* [1991] 1 MLJ 46 (folld)

**Appeal from**: Civil Appeal No 12–15 of 2000 (High Court, Temerloh)

*GP Lim (S Harcharan Singh Randhawa & Partners) for the appellant.*
*B Shanta Mohan (VP Nathan & Partners) for the respondent.*

**Ariffin Zakaria JCA** (delivering judgment of the court):

**[1]** This is an appeal by the appellant/second plaintiff ('appellant') against the decision of the learned judicial commissioner ('JC'). We heard the appeal on 4 October 2004 and we allowed the appeal with costs. We now give our reasons.

**[2]** The claim arose from a road traffic accident involving motorcycle CAH 387 ridden by the first plaintiff with a motorcar WAT 6824 driven by the respondent/defendant (respondent) on 29 August 1997 on Kg Telok Sertang–Temerloh road. The appellant was the pillion rider on the said motorcycle. The third plaintiff is the owner of the motorcycle.

**[3]** The learned sessions court judge (SCJ) dismissed both the claims by the plaintiffs and the counter claim by the defendant. His assessment of general and special damages for the plaintiffs are as follows:

(i) for the first plaintiff, the sum of RM30,000 as general damages and RM1,200 as agreed special damages; and

(ii) for the appellant, the sum of RM35,000 as general damages and RM800 as agreed special damages.

**[4]** The sum of RM250 was agreed as the special damages in respect of the third plaintiff.

**[5]** All three plaintiffs appealed to the High Court against the decision of the learned SCJ. The learned JC allowed the appeal by the plaintiffs and apportioned liability on a 50:50 basis between the parties. As regards quantum, the learned JC agreed with the assessment made by the learned SCJ.

**[6]** The appellant now appeals to this court against the decision of the High Court as regards the apportionment of liability. The issue before us is whether the appellant as the pillion rider is entitled to damages on 100% basis despite the fact that the court had found that the rider of the motorcycle on which he was traveling was 50% liable for the accident. The learned counsel for the appellant submitted that he is so entitled. In support, he cited a number of authorities which we shall refer to later in this judgment.

**[7]** The learned counsel for the respondent submitted that the learned JC failed to address the issue of the counter claim by the defendant. And in the circumstances of this case, it is submitted that the learned JC ought to have allowed the counter claim against the first plaintiff. Had that been done, he contended the amount of the award to the second plaintiff would have been reduced accordingly. He relied on the case of *Murugasan a/l Kuppusamy & Anor v Chiew Eng Chai* [2000] 1 CLJ 42.

**[8]** For convenience, we shall first deal with the issue of the counter claim by the defendant. On this, we agree with the learned counsel for the appellant that before the learned JC, the counter claim was a non-issue because there was no cross appeal by the respondent and for that reason, the learned JC was right in not considering the counter claim of the respondent. That we think disposes of the issue—for how could the learned JC consider the counter claim which was dismissed by the SCJ when there was no appeal by the respondent against the said dismissal?

**[9]** Reverting to the primary issue in this appeal, which is whether the appellant, as the pillion rider, is entitled to damages on 100% basis even though the court found that the rider of the motorcycle was 50% liable for the accident, we only need to refer to some of the authorities cited to us by the parties. Firstly, we would refer to the case of *Damai Cheras Sdn Bhd & Anor v Poothapillai Krishnamoorthy* [1998] 1 MLJ 639. In that case, the respondent (the plaintiff) was the registered owner of and a passenger in a car which was involved in a collision with the first defendant's car, driven by the second defendant. The plaintiff was traveling with his son (SP2) who was authorised by the plaintiff to drive the car. The plaintiff brought an action against the defendants. The SCJ held that the defendants were 10% liable for the accident and since the plaintiff was an innocent passenger at all material times, the plaintiff was entitled to damages on a 100% basis. The defendants appealed. It was submitted that the plaintiff was not an innocent passenger because of the fact that the plaintiff was the owner of the car and SP2 was driving the car with the authority of the plaintiff. Therefore, the plaintiff was vicariously liable for the negligence of SP2 who was 90% liable for the accident. The issue before the court was whether the plaintiff was an innocent passenger and so was entitled to damages on a 100% basis.

**[10]** In that case it was held, *inter alia*, that once a person has proved that he is an innocent passenger, he is entitled to a claim based on 100% liability. It is the personal prerogative of the innocent passenger to sue the negligent party responsible for causing damage or injury to him in the accident. In coming to that finding, the learned judge relied on a long line of authorities namely—*Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244; *Wong Fook & Anor v Abdul Shukur bin Abdul Hakim (Wong Piang Loy, Third Party)* [1991] 1 MLJ 46; *Samsuri bin Saad & Anor v Chew Kit Toh (t/a Kit Thong Woh Hup) and another appeal* [1996] 1 MLJ 576 and *Jayakumar s/o Kuppusamy & Anor v Chen*

*Kit Hong & Anor* [1984] 1 MLJ 376. All the authorities cited by the learned judge point to one conclusion, that an innocent passenger in a motor vehicle or a pillion rider is entitled to recover the total amount of damages against a tortfeasor and it is within his prerogative to recover the damages against any one of the tortfeasors. In *Samsuri bin Saad & Anor v Chew Kit Toh (t/a Kit Thong Woh Hup) and Another Appeal* (supra), the same issue as in the present case was raised, that is, whether a pillion rider was entitled to recover 100% damages against the respondent where the learned SCJ found that both the deceased rider of the motorcycle and the driver of the motor lorry were equally to blame. The learned High Court judge in that case, following *Oli Mohamed v Keith Murphy & Anor* (supra) and *Reliance Omnibus Co Sdn Bhd & Anor v Ishak bin Mohd Jaafar & Anor* [1993] 4 CLJ 291, held that the pillion rider is entitled to the total amount of damages notwithstanding the finding that the deceased rider of the motorcycle and the driver of the motor lorry were equally blameworthy. We wholly agree with the decision of the learned judge in that case.

**[11]** For the above reasons, we hold that the learned JC erred in law in holding that the appellant, the pillion rider on the motorcycle, is 50% liable for the accident. Following the authorities cited, we hold that the appellant is entitled to recover the total amount of damages against the respondent.

**[12]** Accordingly, we allowed this appeal by the appellant with costs. The deposit is to be refunded to the appellant.

*Appeal allowed.*

Reported by Izzaty Izzuddin